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CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1900~~ 1902.

No. ~~302~~ 85.

C. ELLIOTT & CO. ET AL., APPELLANTS,

vs.

FERDINAND TOEPPNER.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED APRIL 22, 1901.

(18,126.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 24, 1902.

1 United States Circuit Court of Appeals, Sixth Circuit. In Bankruptcy.

C. ELLIOTT & CO. ET AL., Appellants, v. FERDINAND TOEPPNER, Appellee. } No. 843. Appeal from the District Court of the United States for the Eastern District of Michigan.

The appellants on September 30, 1899, filed in the district court of the United States for the eastern district of Michigan a petition for the adjudication of Ferdinand Toeppner as a bankrupt, which said petition was in these words and figures:

"To the Honorable Henry H. Swan, judge of the district court of the United States for the eastern district of Michigan:

"The petition of Clifford Elliott, William E. Saunders, William T. Radcliffe and Edward W. Reynolds, general partners doing business as C. Elliott & Company, Albert H. Krum, doing business as A. H. Krum & Co., Albert W. Schloss and Murray S. Schloss, copartners as Schloss Brothers, George C. Wetherbee & Co., a corporation organized under the laws of the State of Michigan, and Phelps, Brace & Co., a corporation organized under the laws of the State of Michigan, respectfully shows:

"1. That Ferdinand Toeppner, of the village of Utica, Macomb county, Michigan, has for six months and more next preceding the date of filing this petition, resided and had his domicile and his principal place of business at the said village of Utica, Macomb county, Michigan, within the eastern district of Michigan, and that he owes debts to the amount of more than one thousand dollars, to wit, seven thousand dollars.

"2. That your petitioners are creditors of said Ferdinand Toeppner, having provable claims amounting in the aggregate in excess of securities held by them, to the sum of more than five hundred dollars; that the nature and amount of your petitioners' claims are as follows: C. Elliott & Co., wholesale grocers, merchandise,
2 $187.53; Albert H. Krum, wholesale rubbers, boots and shoes, merchandise, $63.75; Schloss Brothers, wholesale clothing, merchandise, $450.50; George C. Wetherbee & Co., woodenware, etc., merchandise, $63.16; Phelps, Brace & Co., wholesale grocers, merchandise, $64.24. That your petitioners all have their principal places of business within the said eastern district of Michigan, to wit, at the city of Detroit, Michigan. That none of your petitioners hold any security, whatever, for any of their above-described claims, or any part thereof, nor any promissory note or other commercial paper therefor.

"3. And your petitioners further represent that said Ferdinand Toeppner is insolvent, and that within four months next preceding the date of this petition the said Ferdinand Toeppner committed acts of bankruptcy within the meaning of the act of Congress, en-

titled, 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, as follows:

"(*a.*) That heretofore, to wit, on the thirty-first day of July, 1899, while insolvent, he executed a chattel mortgage to William Schloesler, of Sterling township, Macomb county, Michigan, in the sum of one thousand dollars, which chattel mortgage covered and conveyed all the stock, property and fixtures of the said Ferdinand Toeppner contained in his store building on the east side of Main street, in the village of Utica, consisting of dry goods, clothing, boots and shoes, china and crockery ware, groceries and provisions, cigars, tobacco and all shelving, counters, chairs, desks, tables, show-cases, stoves, lamps and other fixtures contained in said building; also one horse, one phaeton, one end spring top buggy, one light dray, three light harnesses and one heavy harness, which said chattel mortgage was, on the first day of August, 1899, filed in the office of John W. Switzer, clerk of the township of Shelby, in said Macomb county. That he executed and filed said chattel mortgage with intent to prefer the said William Schloesler over his other creditors.

"(*b.*) In that he made, executed and recorded the chattel mortgage above described with intent to hinder, delay and defraud your petitioners, his creditors.

"(*c.*) In that he did, heretofore, to wit, on the — day of March, 1899, while insolvent, make, execute and deliver another chattel mortgage to Edward L. Truba, of Detroit, Michigan, in the sum of two hundred and fifty dollars, which mortgage covers and conveys every article located in and relating to said Toeppner's general store above described at Utica, Michigan, which mortgage was recorded on the 12th day of August, 1899, in the office of the above-named clerk, for Shelby township, after which last-named date it first became known to your petitioners who had not previously received actual notice of said transfer or assignment, nor had the said Truba previously taken notorious, exclusive or continuous possession of the property, covered by said chattel mortgage, which chattel mort-
gage the said Toeppner executed with the intent thereby to
3 prefer the said Truba over his other creditors, your petitioners and others, which chattel mortgage therefore constitutes an unlawful transfer of the said Toeppner's property within the meaning of the said act to establish a uniform system of bankruptcy throughout the United States.

"(*d.*) In that he made, executed, delivered and recorded the last above described chattel mortgage with intent to hinder, delay and defraud your petitioners and others of his creditors.

"(*e.*) In that he did, heretofore, to wit, on the fifth day of August, 1899, while insolvent, make, execute and deliver a third chattel mortgage to A. Krolik & Co., of Detroit, Michigan, in the sum of one thousand nine hundred eighteen and $\frac{61}{100}$ dollars, which chattel mortgage conveyed and covered all the said Toeppner's above-described stock of goods in his general store at Utica, Michigan, and also all book accounts and notes, together with all books of account and all other evidences of debt, and all other personal property of every

kind and nature which at any time may be added to or purchased for or used in connection with the said stock, which chattel mortgage was, on the fifteenth day of August, 1899, filed in the office of the said clerk of the said township of Shelby, which chattel mortgage constitutes a transfer of the said debtor's property and was made by him with intent to prefer the said Krolik & Co., over his other creditors, and is consequently an unlawful transfer within the meaning of the said act to establish a uniform system of bankruptcy throughout the United States.

"(*f.*) In that he executed the last above described chattel mortgage with intent to hinder, delay and defraud his creditors or part of them.

"(*g.*) In that while insolvent, he has suffered and permitted certain creditors to obtain preferences through legal proceedings, not having at least five days before a sale or final disposition of his property effected by such preferences, vacated or discharged such preferences, especially in that on or about the sixth day of September, David H. and John I. Crissman, copartners as Crissman & Son, of Utica, Michigan, secured a judgment against him in justices' court for the amount of $160.00; and about the same time the Warren Boot and Shoe Company, a corporation organized under the laws of the State of Massachusetts, secured a judgment against him in justices' court for the amount of $80.00, and another party whose name is unknown to your petitioners, secured a judgment about the same time against him to the amount of about $114.00. And, thereupon, the said judgment creditors swore out immediate executions and levied upon all the stock of the said defendant's general store, closed the same up for several days and took an inventory, after which the said defendant paid the amount of said judgment with costs and expenses. And the Coronet Corset Company on or about the 20th day of September, secured a judgment against the said defendant, in justices' court for the amount of $42.06, as your petitioners are informed and believe, which judgment remains unsatisfied, and three other cases are pending in justices' court in the city of

4 Mt. Clemens, said county and State, against the said defendant, the result of all which proceedings has been and will be to secure said illegal preferences for the said creditors, plaintiffs in said suits unless the said defendant shall be declared a bankrupt under the acts of Congress with regard to bankrupts.

"4. And your petitioners further show that the said chattel mortgages above described cover all the property of every name and nature possessed by the said Ferdinand Toeppner, with the exception of such property as is exempt under the laws of the State of Michigan from levy of execution; that the said chattel mortgages aggregate the sum of $3,168.61, which is nearly as much as the property covered thereby is worth; that the said Toeppner, at the time he executed said mortgages, and at the present time, was indebted in the sum of not less than six thousand dollars and was insolvent.

"5. That afterwards, and on or about the 15th day of September, 1899, the said Ferdinand Toeppner made, executed and delivered

to his son, William Toeppner, a bill of sale covering all of his said stock of goods in his said general store, and also all accounts and bills receivable for a consideration of sixty dollars, which he claims was due to his son for services rendered as clerk in said store, and the further consideration of a promissory note for $190.00, executed by the said son and delivered to him. And your petitioners further show that William Toeppner is a boy of about twenty-two years of age who lives at home with his father, and has been working as a clerk in said general store, and while your petitioners do not claim that the said bill of sale was made for an adequate consideration, they believe and charge that it was not made in good faith, but with intent to hinder, delay and defraud the creditors of the said Ferdinand Toeppner. And they further show that by the said bill of sale the said Ferdinand Toeppner conveyed all the property which he possessed, not exempt from execution, under the laws of the State of Michigan, and left himself totally without resources with which to pay your petitioners and his other creditors not preferred as above set forth, the amount of their just claims, or any part or portion thereof whatever.

Wherefore your petitioners pray that service of this petition with a subpœna be made upon the said Ferdinand Toeppner as provided in the acts of Congress relating to bankrupts, and that he may be adjudged by the court to be a bankrupt within the purview of said acts.

(Signed) C. ELLIOTT & CO.,
By CLIFFORD ELLIOTT.
W. H. KRUM & CO.,
By ALBERT H. KRUM.
SCHLOSS BROS.,
By ALBERT W. SCHLOSS.
GEORGE WETHERBEE & CO.,
By M. C. WETHERBEE, Jr.
PHELPS, BRACE & CO.,
By W. H. BRACE, *Pres't.*

A. G. PITTS, *Attorney.*

5 UNITED STATES OF AMERICA, } ss:
Eastern District of Michigan, County of Wayne, }

Clifford Elliott, Albert H. Krum and Albert W. Schloss, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition subscribed by them are true. Before me a notary public in and for said county this 30th day of September, A. D. 1899.

(Signed) OLIVER M. LEONARD,
Notary Public, Wayne Co., Mich."

Process was served upon said Toeppner, October 2, 1899, and upon the 14th of October, said Toeppner filed his answer, which was in the following words and figures:

"The answer of Ferdinand Toeppner to the petition of Clifford

Elliott, William E. Saunders, William Radcliffe, and Edward W. Reynolds, general partners, doing business as C. Elliott & Co., Albert H. Krum, doing business as A. H. Krum & Co., Albert W. Schloss and Murray E. Schloss, copartners as Schloss Brothers, George C. Wetherbee & Co., a corporation organized under the laws of the State of Michigan, and Phelps, Brace & Co., a corporation organized under the laws of the State of Michigan, to have the said respondent declared a bankrupt, this respondent reserving all rights of exceptions to the manifold errors and insufficiencies in said petition contained, for answer thereto says:

"First.

"That he admits the allegations contained in the first paragraph of said petition.

"Second.

"That he admits the allegations contained in the second paragraph of said petition.

"Third.

"That he denies that he was insolvent at the time of filing the said petition and that he had committed acts of bankruptcy within the meaning of the act of Congress, entitled, 'An act to establish a uniform system of bankruptcy throughout the United States.' He admits that he executed the chattel mortgage described in subdivision (*a*) of paragraph three of said petition, but he says that said chattel mortgage was given to secure the said William Schoesler for money borrowed by this respondent and that this respondent at the time of the execution of said mortgage had sufficient property over and above the amount secured by said mortgage to pay all his debts and he denies that said mortgage was executed for the purpose of hindering, delaying and defrauding the above-named petitioners, or any other person, and that said money secured by said mortgage was used to discharge legal debts against the said respondent.

"He admits the execution of the chattel mortgage to Edward L. Truba, of Detroit, Michigan, but he says that the said mort-
6 gage was given to secure the payment of money borrowed from the said Edward L. Truba, that it was executed in good faith without any attempt to hinder, delay or defraud the said petitioners or any other person, and that the said respondent had sufficient property to meet all his liabilities over and above said mortgage.

"He admits the execution of the chattel mortgage described in said petition, A. Krolik & Co., of Detroit, Michigan, but he denies that said mortgage was executed for the purpose of hindering, delaying or defrauding any of the said petitioners but was executed in good faith and for a valuable consideration.

"He admits that certain judgments were taken against him as described in said petition, but he says that said judgments were procured without his consent, and that with the exception of one judgment of $42.00, the said judgments have been discharged and paid.

"Fourth.

"That he admits that the aggregate of said mortgage is correctly stated in said petition, but he says that the whole of said property covered by said mortgages is worth about $7,000.00.

"Fifth.

"He admits the execution of the bill of sale to William Toeppner, his son, but he says that the said bill of sale was given to secure the sum for labor furnished to this respondent and that the said bill of sale was not executed for the purpose of hindering, delaying or defrauding the said petitioners or any other person.

"Therefore, the said respondent prays that the said petition be dismissed with costs.

"(Signed) FERDINAND TOEPPNER.

"UNITED STATES OF AMERICA,
"*Eastern District of Michigan, County of Wayne,* } *ss:*

"On this tenth day of October, 1899, before me a notary public in and for said county, personally appeared Ferdinand Toeppner, who made oath that he had heard read the foregoing answer by him subscribed and that the statements therein contained are true.

"(Signed) ISAAC N. PAYNE,
"*Notary Public, Wayne County, Michigan.*

"E. J. JEFFRIES,
"*Attorney for Respondent.*"

On the same day, Toeppner filed a demand for a jury trial which was in these words:

"UNITED STATES OF AMERICA:

"In the District Court of the United States for the Eastern District of Michigan.

"In the Matter of the Petition of CLIFFORD ELLIOTT ET AL. for the Adjudication of Ferdinand Toeppner, a Bankrupt.

"Now comes the said respondent, Ferdinand Toeppner, and demands a jury to try the issues raised in said cause.

"(Signed) E. J. JEFFRIES,
"*Attorney for Defendant, Ferdinand Toeppner.*"

7 November 14th and 15th, the issues were tried before a jury who returned a verdict of "not guilty."

A motion for a new trial was entered and overruled, and judgment entered, adjudicating that said Ferdinand Toeppner was not a bankrupt and dismissing the petition praying an adjudication of bankruptcy. The journal entry shown by the transcript of the record thus adjudging that said Toeppner was not a bankrupt is in these words:

"At a session of the district court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district court room in the city of Detroit, in said district, on Monday, the fifteenth day of January, nineteen hundred.

"Present: The Hon. Henry H. Swan, district judge.

"In the Matter of the Petition of CLIFFORD ELLIOTT ET AL. to Have Ferdinand Toeppner Adjudicated a Bankrupt.

"In Bankruptcy.

"The court delivered judgment on motion for a new trial now argued and submitted. The same having been duly considered, it is now by the court ordered, adjudged and decreed that the same be and is hereby denied. This cause came on to be heard at Detroit, in said district, in said court, upon the petition of Clifford Elliott *et al.*, that the said Ferdinand Toeppner be adjudged a bankrupt, and a jury trial having been duly demanded by the respondents, and the said cause having been tried before a jury duly empaneled herein, and the said jury, after hearing the testimony of the petitioners and respondent, and the argument of counsel and charge of the court, after due deliberation, determined by their verdict that the facts set forth in said petition were not proven. It is, therefore, adjudged by the court that the said Ferdinand Toeppner was not a bankrupt, and that said petition be dismissed. Thereupon, twenty days are granted to settle a bill of exceptions and to perfect appeal."

On the same day, January 15, 1900, the appellants being petitioners below, filed a petition praying to be allowed an appeal to the circuit court of appeals, from the judgment refusing to adjudge the said Ferdinand Toeppner a bankrupt, and filed therewith an assignment of errors. No bill of exceptions was asked or taken and no writ of error was sought or allowed.

The appeal thus prayed was in due time allowed, and an appeal has been perfected by the due execution of the bond required by the order allowing the appeal. A transcript of the record from the district court has been filed in this court, which, in addition to the matters already stated, includes what purports to be all of the proceedings in the jury trial, as follows:

8 A. The evidence heard by the jury upon the issues submitted to it.

B. Exceptions reserved to evidence admitted or excluded.

C. The charge of the court.

D. Exceptions to the charge.

E. Requests for charges refused and exceptions to this action of the court.

The errors assigned relate exclusively to errors alleged to have been committed during the trial before the jury of the issues submitted. The transcript includes no bill of exceptions. The only certificate to the transcript is by the clerk of the district court, under the seal of the court, and is in these words:

"The District Court of the United States for the Eastern District of Michigan.

"In the Matter of the Petition of CLIFFORD ELLIOTT ET AL. to Have Ferdinand Toeppner Adjudicated a Bankrupt.

"In Bankruptcy.

"EASTERN DISTRICT OF MICHIGAN, *ss:*

"I, Darius J. Davison, clerk of the district court of the United States for said district, do hereby certify that the above and foregoing is a full and true transcript of the record in the matter above entitled; that I have carefully compared the same with the original records and files of said matter in my office, and find the same to be a true transcript of said originals and of the whole thereof, together with the original exhibits produced on the trial of said matter.

"In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this 20th day of April, A. D. 1900.

"[SEAL.] D. J. DAVISON, *Clerk.*"

After the transcript aforesaid had been duly filed in this court, the appellee moved the court to dismiss the appeal and to strike from the transcript so much as purports to set out the proceedings upon the jury trial of the issue submitted to the jury.

These motions came on to be argued, and were heard with the merits of the case and judgment has been reserved, the court being in doubt as to how the questions thus raised should be decided until it can obtain the instruction of the Supreme Court as to the jurisdiction of this court under the 25th section of the bankrupt act of 1898, to review the proceedings upon a jury trial, authorized by the 19th section of the same act.

It is accordingly ordered that the foregoing statement
9 of facts be certified to the Supreme Court, together with the following interrogatory:

Has this court, under the appeal granted from the judgment refusing to adjudicate Ferdinand Toeppner a bankrupt, authority to re-examine the proceedings upon the jury trial, and remand for a new trial if it shall appear from the transcript as certified to us, that there was error in instructions given or refused or in the admission or rejection of evidence?

HORACE H. LURTON,
HENRY F. SEVERENS,
WALTER EVANS,
Judges of the U. S. Circuit Court of Appeals for the 6th Circuit, Sitting in said Cause.

10 UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit, }

United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing certificate and statement of facts in the case of C. Elliott & Co. *v.* Ferd. Toeppner, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the city of Cincinnati, Ohio, this 18 day of February, A. D. 1900.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of United States Circuit Court of Appeals
for the Sixth Circuit.

[Endorsed:] United States circuit court of appeals for the sixth circuit. Questions certified to the Supreme Court of the United States.

Endorsed on cover: Certificate. File No. 18,126. U. S. C. C. of appeals, 6th circuit. Term No. 302. C. Elliott & Co. *et al.*, appellants, *vs.* Ferdinand Toeppner. Filed April 22nd, 1901.